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Case No. 94-354

In The
Supreme Court of the United States
October Term, 1994

PAUL H. KRALMAN,

PETITIONER,

v.

ILLINOIS DEPARTMENT OF VETERANS' AFFAIRS,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

Roland W. Burris
Attorney General
State of Illinois

By: SCOTT C. HELMHOLZ
(Counsel of Record)
and John A. Kauerauf
Special Assistant Attorneys General
Sorling, Northrup, Hanna,
Cullen and Cochran, Ltd.
607 East Adams, Suite 800
Springfield, IL 62701
(217) 544-1144

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QUESTION PRESENTED FOR REVIEW

Whether a job applicant can defeat an employer's motion for summary judgment in an action for refusal to hire under the Age Discrimination In Employment Act where the applicant has failed to adduce any evidence to contradict the factual basis for the employer's explanation of its refusal to hire applicant?

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JURISDICTION

Defendant accepts Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

This is a "refusal to hire" case under the Age Discrimination in Employment Act, 29 U.S.C. §621, ("ADEA") in which the District Court granted, and the Seventh Circuit affirmed, summary judgment in favor of the employer under Rule 56 Fed.R. Civ.P. The Illinois Department of Veterans' Affairs ("IDVA"), an executive agency of the State of Illinois, employed Plaintiff Paul Kralman as a Veterans' Service Officer ("VSO") in its Vandalia, Illinois office from May, 1979, until the Vandalia office closed in August, 1987, due to lack of funding. Personnel rules at the time gave Mr. Kralman three choices regarding future employment with IDVA: (1) transfer to another VSO office;

(2) accept the layoff and retain an absolute right of recall should the Vandalia office reopen, or (3) retire from employment and accept pension benefits. Mr. Kralman refused a proffered transfer to an identical position at a nearby office, waived his recall rights to the Vandalia position, and elected to retire and draw a pension.

In March, 1989, IDVA made plans to reopen several previously closed offices, including Vandalia. Upon learning of these plans, Mr. Kralman, then age 71, requested that the Director exercise his discretionary power to reinstate Kralman to the Vandalia VSO position. Although Mr. Kralman hoped by this request that IDVA would exercise its discretion in his favor and reinstate him without considering other qualified applicants, IDVA chose instead to interview all

candidates deemed qualified for the position by the Department of Central Management Services ("CMS"), the personnel management agency charged with screening applicants for all State employment.

CMS certified Mr. Kralman and three (3) other applicants for the position, and IDVA interviewed all four. IDVA ultimately hired one of the four candidates, Lynn P. Brown, upon the recommendation of the interviewer, Howard Wilson. Mr. Kralman's description of Mr. Brown's previous experience as "consisting of working at a tavern at the American Legion tending bar" unfairly implies that Mr. Brown had no other previous employment experience. It is undisputed that Mr. Brown, a 46 year old disabled veteran, had three years of college education, had previously held a position as a branch

bank manager, and had successfully pursued veterans' benefits on his own behalf.

Howard Wilson, VSO Supervisor for IDVA's Southern Division, and a 19-year employee, conducted the interviews for the VSO position in November, 1989. Mr. Wilson was 64 years old at the time. At the conclusion of the process, Mr. Wilson recommended Mr. Brown to fill the VSO position and his superiors accepted his recommendation without question or substantive review. In response to deposition questions by Mr. Kralman's counsel, Mr. Wilson advanced three reasons to support his decision to hire Mr. Brown:

(1) Mr. Brown's superior education;

(2) Mr. Brown's demeanor during the interview; and

(3) Mr. Brown's disabled veteran's status.

The record established that Mr. Kralman had very slight post-secondary education and did nothing to prepare for the interview. There is no dispute that Mr. Brown had completed 3 years of college and had a military service-connected disability. Mr. Kralman's assertion that he was rated "exceeds expectations by his supervisors" during his 7 years' tenure as a VSO ignores the uncontradicted testimony of IDVA witnesses that Kralman's supervisor so routinely rated subordinates "exceeds expectations" as to render these evaluations meaningless.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY *CERTIORARI* BECAUSE BOTH LOWER COURTS HAVE APPLIED WELL-SETTLED PRINCIPLES OF LAW TO UNDISPUTED FACTS AND NO COMPELLING REASONS EXIST FOR THIS COURT TO REEXAMINE THOSE PRINCIPLES.

The Seventh Circuit's decision complies with the spirit and the letter of Federal Rule of Civil Procedure Rule 56 as interpreted by prior decisions of this Court. Petitioner does not here nor has he ever established the existence of any genuine material facts or reasonable inferences suggesting that Howard Wilson recommended against hiring Petitioner on account of his age. The Seventh Circuit's decision does not conflict with the decision of another circuit or prior decision of this Court. This Court thus has no call to exercise its power of supervision to review or to disturb the Seventh Circuit's decision. Moreover, this Court has denied *certiorari* in at least one prior Seventh Circuit ADEA case that presented similar issues. Perfetti v. First National Bank of Chicago, 950 F.2d

449 (7th Cir. 1991); cert. den., 112 S.Ct. 2995 (1992).

ARGUMENT IN SUPPORT

The case at bar is precisely the type of case Federal Rule of Civil Procedure Rule 56 is designed to weed out from the overburdened dockets of the federal judiciary. Mr. Kralman, after deposing 15 potential witnesses and engaging in substantial written discovery over several years, presented to the courts below (and now to this Court) nothing more than a series of unsupported allegations, innuendo and conjecture accompanied by a plea to allow him to present his allegations to what he hopes will be a sympathetic jury. Much more is obviously required to defeat a motion for summary judgment.

Mr. Kralman's claim of age discrimination, despite much embellishment

by his counsel, basically derives from a simplistic syllogism: because Kralman had 8 years' experience in the VSO position, the act of selecting any candidate who did not have equal or greater experience constitutes evidence from which a jury could conclude that Howard Wilson's proffered reasons were unworthy of credence and thus pretextual, therefore entitling Kralman to a jury trial on the issue of Wilson's credibility.

The flaw in this logic, and the primary reason for denying *certiorari* in this cause, is that mere contentions cannot take the place of the tangible, countering evidence that this Court and the Seventh Circuit have insisted on in order to defeat summary judgment. This rule of law requires that Mr. Kralman adduce some evidence that Howard Wilson's proferred reasons are unworthy of credence

and thus a pretextual cover-up for an illegal act of age discrimination.

Mr. Wilson's testimony explaining his selection of Mr. Brown must be taken as true and made in good faith for Rule 56 purposes unless Mr. Kralman can adduce evidence from which a reasonable juror could infer Wilson's statements were not made in good faith. It is easy to discuss the type of evidence that would allow such an inference. Testimony that Mr. Wilson knew that Mr. Brown had falsified his educational background; testimony that Mr. Brown was not in fact disabled or a veteran, and that Mr. Wilson knew or had reason to know these matters; testimony that Mr. Wilson had seen memos or been specifically instructed that he was not to consider disabled veteran's status in making hiring recommendations. In the absence of evidence of this nature, there

can be no genuine issue of material fact as to Mr. Wilson's good faith and thus no basis for a reasonable juror to infer he testified in bad faith.

This Court has already offered thorough guidance to its lower courts as to how summary judgment motions should be evaluated. Matsushita Electric Industrial Co., Ltd., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corporation v. Catrett, 477 U.S. 317 (1986). The party opposing summary judgment must establish the existence of a genuine material factual dispute. The "mere existence of some alleged factual dispute between the parties will not defeat" a motion for summary judgment. Anderson, 477 U.S. at 247-248. Factual disputes which are irrelevant or unnecessary do not allow a court to deny summary judgment motions,

rather there must be material factual disputes. Anderson, 477 U.S. at 248.

The Seventh Circuit in its analysis of the record below found that Mr. Kralman had presented no facts from which a reasonable jury could conclude that Howard Wilson's proffered reasons for recommending Lynn Brown were bad-faith pretexts advanced to cover up illegal discriminatory intent. The fact that a determination regarding Mr. Wilson's state of mind is called for does not preclude summary judgment. In Anderson, this Court specifically rejected the argument that cases which hinge on interpretations of state of mind are inappropriate for summary judgment resolution. Summary judgment should in fact be granted in such a case unless the non-movant presents "concrete evidence" which a "reasonable" juror could rely upon to find in the non-

movant's favor. Anderson, 477 U.S. 256-257. There is no concrete evidence in the case at bar which a reasonable juror could rely upon to reject Mr. Wilson's stated reasons.

The facts presented by Mr. Kralman in opposition to summary judgment consist of no more than equivocal circumstances, e.g., Mr. Kralman was older than Mr. Brown, Mr. Kralman had prior experience as a VSO, the Vandalia position remained open for a period of time before interviews were conducted, and IDVA officials other than Howard Wilson denied the existence of a hiring preference for disabled veterans. The balance of what Mr. Kralman presents as facts are not facts, but merely inferences and conclusions he labels as facts. Assuming the truth of the above facts, they do not constitute evidence that would create any reasonable inference

that Howard Wilson's testimony concerning his reasons for recommending Lynn Brown was in bad faith or unworthy of credence.

Mr. Kralman asserts variously that Mr. Wilson's decision is "arbitrary," "without basis in fact," and that in his deposition testimony Wilson "could not articulate a factual basis to support his claim" and failed "to advance a factual basis to support his conclusion that Mr. Kralman's demeanor was in any way less desirable or proper" than Mr. Brown's. Having stated his reasons for recommending Mr. Brown for the position, Mr. Wilson had no legal obligation to give persuasively articulate deposition testimony. Whatever lack of articulation Mr. Kralman (or even this Court) finds in Mr. Wilson's testimony cannot supply the "concrete evidence" of contradiction required to create a genuine issue of material fact.

It is not enough for Mr. Kralman to make semantic jabs at Mr. Wilson's deposition testimony to defeat summary judgment; it is incumbent upon him to contradict Wilson's testimony with countering testimony or exhibits.

In the case at bar, Mr. Kralman has never advanced any fact or theory as to why the 64 year old Wilson would want to discriminate against Mr. Kralman on account of his age. This Court has held that the absence of any plausible motive is highly relevant to whether a genuine issue for trial exists. Matsushita Electric Industrial Co., Ltd., 475 U.S. 596-597. Otherwise rational conduct exhibited in the absence of any motive to engage in illegal conduct does not give rise to an inference of illegal activity. Matsushita Electric Industrial Co., Ltd., 475 U.S. at 596-597.

Nor does summary judgment in this case unduly abridge the right to jury trial established by the ADEA, as suggested by Mr. Kralman. In reviewing lower court decisions involving motions for summary judgment, this Court has stated that such motions "must be construed with due regard not only for the rights of persons asserting claims...but also for the rights of persons opposing such claims...to demonstrate...prior to trial, that the claims...have no factual basis." Celotex Corp., 477 U.S. at 327. Summary judgment thus is not a "disfavored procedural shortcut", but is rather an integral part of the Federal Rules allowing the "just, speedy and inexpensive determination of every action." Celotex Corp., 477 U.S. at 327. If Mr. Kralman wants to present a case to a jury, he must first establish facts a jury could

reasonably rely upon to conclude that Mr. Wilson's reasons are unworthy of credence. Since he has not, Defendant's rights guaranteed by Rule 56 must prevail over Kralman's ADEA-based right to a jury trial.

Mr. Kralman's petition fails to articulate any of the traditional reasons this Court has viewed as important in determining whether to grant *certiorari*. No conflict between the circuits is presented. No conflict with any state court is presented. No conflict with any prior decision of this Court is presented. Supreme Court Rule 10. On the contrary, as explained above, the Seventh Circuit's rationale is wholly consistent with this Court's decisions in Matsushita, Anderson and Celotex. Mr. Kralman accordingly has presented no compelling reason for this Court to grant *certiorari*. Mr. Kralman

essentially asks this Court to overturn well-settled principles under ADEA and Rule 56 in order to serve as a super-personnel committee to review a routine hiring decision. As this Court has pertinently observed, "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies". Bishop v. Wood, 426 U.S. 349 (1976).

CONCLUSION

In concluding that Mr. Kralman has failed to adduce sufficient evidence to create a genuine issue of material fact as to the credence of IDVA's proffered reasons, both the Seventh Circuit and the District Judge have applied well-settled principles of law to undisputed fact.

For the foregoing reasons, Respondent, Illinois Department of Veterans' Affairs, prays this Court deny Petitioner's Petition for *Writ of Certiorari*.

Respectfully submitted,

Roland W. Burris
Attorney General
State of Illinois

By: SCOTT C. HELMHOLZ
(Counsel of Record)
and John A. Kauerauf
Special Assistant Attorneys General
Sorling, Northrup, Hanna,
Cullen and Cochran, Ltd.
607 East Adams, Suite 800
Springfield, IL 62701

Attorneys for the Illinois
Department of Veterans' Affairs.